No. 05-766

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SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

APCC SERVICES, INC., *et al.*,
*Petitioners,*

v.

SPRINT COMMUNICATIONS COMPANY L.P., *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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## QUESTIONS PRESENTED

1. Whether the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (collectively, the "Telcom Act"), confers a private right of action for damages for alleged violations of the FCC's 1999 "dial-around" payphone compensation plan ("1999 Order").

2. Whether a subsequent order promulgated by the FCC in 2003, which determined that the 1999 Order was unworkable and replaced it with a substantively new compensation plan, retroactively can form the basis of a private right of action under the Telcom Act for lawsuits that were filed prior to the 2003 Order and that allege violations only of the superseded 1999 Order.

3. Whether Petitioners have standing to sue under the Telcom Act for alleged violations of the 1999 Order when the payphone service providers ("PSPs") that Petitioners purport to represent assigned their claims to Petitioners solely for collection purposes, any and all proceeds that Petitioners collect must be passed back to the PSP-assignors, and Petitioners have no financial interest in the outcome of the litigation.

## RULE 29.6 DISCLOSURES

A. The shares of Respondent AT&T Corp. are 100 percent owned by AT&T, Inc.

B. Respondent Sprint Communications Company L.P. is a limited partnership and is indirectly wholly-owned by Sprint Nextel Corporation. The partners of Sprint Communications Company L.P. are: U.S. Telecom, Inc., which is the general partner and wholly-owned subsidiary of Sprint Nextel Corporation; UCOM, Inc., which is a limited partner; Utelcom, Inc., which is a limited partner; and Sprint International Communications Corporation, which is a limited partner. Sprint Nextel Corporation is a holding company which offers shares of stock to the public under the symbol "S". Only Sprint Nextel Corporation offers shares of stock on public markets. No person or entity owns more than ten percent of Sprint Nextel Corporation's stock.

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Respondents AT&T Corp. ("AT&T") and Sprint Communications Company L.P. ("Sprint") respectfully submit this brief in opposition to the Petition of APCC Services, Inc., *et al.* ("Petitioners") for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

## STATUTES AND REGULATIONS

The relevant statutory provisions are set forth in the Petition at App. 152a-179a.

## INTRODUCTION

The Petition seeks review of a D.C. Circuit decision holding that alleged violations of a payphone compensation plan adopted by the FCC in 1999 are not privately enforceable in federal court under §§ 276, 416(c), or 201(b) of the Telcom

Act. Petitioners wrongly claim that the D.C. Circuit erred in its analysis of each of the three statutes, and that the court's analysis of § 201(b), in particular, creates an "irreconcilable" conflict with *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (9th Cir.), *petition for cert. filed*, 74 U.S.L.W. 3352 (U.S. Nov. 25, 2005) (No. 05-705).

The Petition does not present any question requiring this Court's review and should be denied. The D.C. Circuit applied well established, properly stated rules of law and reached the correct result on all counts. The D.C. and Ninth Circuits are the only courts of appeals to address private enforcement of the various payphone compensation plans adopted by the FCC. Applying *Alexander v. Sandoval*, 532 U.S. 275 (2001), both courts found nothing in the text of § 276 that suggests Congress intended for these regulatory plans to be privately enforceable in federal court. Both courts also are in accord in ruling that § 416(c) cannot be read to supply such a private remedy. With respect to the § 201(b) question, the two courts considered different payphone compensation plans established in different FCC Orders that were issued several years apart. Petitioners brought suit here for alleged violations of the 1999 Order; hence, the D.C. Circuit focused its analysis on that Order. It held that the FCC had not rendered any interpretation of § 201(b) in the 1999 Order, much less an authoritative interpretation worthy of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). By contrast, the PSPs in *Metrophones* brought suit for alleged violations of the 2001 Order; in rendering its holding, the Ninth Circuit did not review the 1999 Order but instead reviewed the FCC's 2003 Order, which replaced the 2001 and 1999 Orders and adopted a new payphone compensation plan. Thus, the Petition is wrong in claiming that the two decisions pose a direct and irreconcilable conflict. Because the D.C. and Ninth Circuits

were examining the § 201(b) question in the context of very different FCC Orders, the so-called "split" between their decisions is not a suitable one for review by this Court.

In addition to reaching the correct result, the D.C. Circuit's decision does not merit review for other reasons. By suggesting that the D.C. Circuit should have made a primary jurisdiction referral to the FCC, Petitioners virtually concede that intervention by this Court is unwarranted at this time. If the FCC believes that a violation of its most recent payphone compensation plan should be actionable in federal court pursuant to § 201(b), the agency can and should justify that interpretation in a properly noticed rulemaking based on an adequate administrative record. Any such FCC determination would be judicially reviewable in the ordinary course.

Moreover, § 201(b) does not expressly authorize the FCC to promulgate retroactive rules. The 2003 Order, which adopted a new payphone compensation plan, cannot be used to supply a private right of action for alleged violations of the 1999 Order, which by the FCC's own account imposed different substantive obligations, was ambiguous in material respects, and proved unworkable.

In any event, the § 201(b) question has limited importance. Petitioners' claims are based solely on alleged violations of the compensation plan established in the 1999 Order. The FCC abandoned that plan and adopted new compensation plans in the 2001 and 2003 Orders. Because the limitations period for payphone compensation claims is two years, any new claims for alleged violations of the 1999 Order would be time-barred. The issues presented by Petitioners, therefore, are the last of their kind.

Finally, this case is not a proper vehicle for review of any of the questions presented in the Petition because serious issues exist concerning the standing of virtually all of the

Petitioners. This Court would need to resolve these issues, to ensure that Article III standing requirements are satisfied, before addressing the questions presented in the Petition.

## COUNTERSTATEMENT OF THE CASE

### A. The Payphone Compensation Directive In § 276 Of The Telcom Act

Historically, the Bell Operating Companies ("BOCs") and other similar local exchange carriers ("LECs") were the exclusive providers of payphone service ("PSPs"). In the mid-1980s, advances in computer technology began to enable payphones to perform many of the control and supervision functions of the BOCs' networks, opening the door for new entrants to offer competitive payphone service. *New England Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 71 (D.C. Cir. 2003).

Despite these advances, PSPs that were unaffiliated with a BOC remained at a competitive disadvantage. Consumers increasingly were using calling card platforms (subscriber 800 calls) and other means to "dial around" the PSP's pre-subscribed interexchange carrier ("IXC") and to place calls from payphones without using coins. Independent PSPs thus received no compensation for these calls. By contrast, BOCs received some compensation for dial-around calls through the intrastate and interstate access charges that IXCs, like Sprint and AT&T, paid for use of the LECs' networks. App. 2a; *see also In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* ("*Payphone Docket*"), Notice of Proposed Rulemaking ("1996 NPRM"), 11 F.C.C.R. 6716, 6721 (¶ 7) (1996).

Congress addressed this issue (and others) in the Telecommunications Act of 1996, which amended the Communications Act of 1934 with the express goal of "opening all

telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996). Section 276 of the Telcom Act, in particular, was enacted to promote "competition among payphone service providers [and] the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). The most relevant mandate of § 276 directs the FCC to "establish a per call compensation plan to ensure that all [PSPs] are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ." *Id.* § 276(b)(1)(A).

### B. The FCC's Payphone Compensation Orders

Over the past decade, the FCC has issued a series of orders attempting to implement the payphone compensation directive of § 276(b)(1)(A).[1] The FCC has considered various regulatory approaches to compensate PSPs for dial-around calls. *Payphone Docket*, Report & Order ("1996 Order"), 11 F.C.C.R. 20,541, 20,580-86 (¶¶ 77-87) (1996). One approach would have required the *calling party* to deposit coins into the

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[1] *See Payphone Docket*, NPRM, 11 F.C.C.R. 6716 (1996); Report & Order, 11 F.C.C.R. 20,541 (1996); Order on Recons., 11 F.C.C.R. 21,233 (1996), *aff'd in part and remanded in part sub nom. Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997); Second Report & Order, 13 F.C.C.R. 1778 (1997), *aff'd in part and remanded in part sub nom. MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report & Order and Order on Recons. of the Second Report & Order, 14 F.C.C.R. 2545 (1999), *aff'd sub nom. APCC v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); Second Order on Recons., 16 F.C.C.R. 8098 (2001); Third Order on Recons. and Order on Clarification, 16 F.C.C.R. 20,922 (2001), *remanded sub nom. Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); Fourth Order on Recons. and Order on Remand, 17 F.C.C.R. 2020 (2002); Fifth Order on Recons. and Order on Remand, 17 F.C.C.R. 21,274 (2002), *aff'd sub nom. AT&T v. FCC*, 363 F.3d 504 (D.C. Cir. 2004); Report & Order, 18 F.C.C.R. 19,975 (2003); *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir.) *pet. for reh'g denied*, No. 04-7034, 2005 U.S. App. LEXIS 24402 (D.C. Cir. Nov. 10, 2005).

payphone before placing a call. 1996 NPRM, 11 F.C.C.R. at 6730 (¶ 27). Another approach would have charged the *called party* a "set use" fee for the payphone call, which would have been billed and collected by IXCs on a monthly basis (much like a collect call). *Id.* at 6729-30 (¶ 26). The FCC concluded that either of these approaches would satisfy § 276(b)(1)(A)'s mandate, but ultimately the agency determined that it would be more administratively efficient to adopt a "carrier-pays" approach, under which the IXC or switch-based reseller ("SBR") that "terminates" the payphone call compensates the PSPs. 1996 Order, 11 F.C.C.R. at 20,586 (¶ 86); *Payphone Docket*, Order on Recons., 11 F.C.C.R. 21,233, 21,277 (¶ 92) (1996). The FCC found this approach "preferable because it would result in less transaction costs because the toll-carrier could aggregate its payments to [PSPs, whereas] [u]nder a set use fee . . . these payments would be spread among a vast number of payphone callers through their individual telephone bills." 1996 Order, 11 F.C.C.R. at 20,580 (¶ 77).

Petitioners wrongly claim that the FCC invoked § 201(b) of the Telcom Act, which makes it unlawful for common carriers to engage in "unjust or unreasonable" practices, as a basis for the payphone compensation plan adopted in the 1996 Order. Pet. 7. In fact, throughout the Order, the FCC consistently stated that it was implementing a compensation plan for interstate and intrastate dial-around calls pursuant to the express congressional directive in § 276. *See, e.g.*, 1996 Order, 11 F.C.C.R. at 20,551-604 (¶¶ 20-126). Nowhere in the 1996 Order did the agency assert that an alleged violation of its compensation plan for such calls would be privately enforceable under § 201(b). Indeed, the FCC only referred to § 201(b) (as well as § 4(i) of the Telcom Act) as a source of authority to regulate dial-around international calls, which § 276—by its express terms—does not encompass. *Id.* at 20,569 (¶ 54).

In 1999, the FCC issued another order establishing the compensation rate for the "carrier-pays" approach outlined in its 1996 Order. *Payphone Docket*, Third Report & Order and Order on Recons. of Second Report & Order ("1999 Order"), 14 F.C.C.R. 2545, 2553-54 (¶ 18), 2597-98 (¶¶ 115-116) (1999). The public notice seeking comment on the proposed 1999 Order gave no indication that the agency was considering classifying violations of the payphone compensation plan as "unjust or unreasonable" practices within the meaning of § 201(b), redressable in federal court. *Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding*, Public Notice, 13 F.C.C.R. 12,093 (1998). And the 1999 Order itself contains only a single general reference to § 201, along with a laundry-list of other statutes, in the boilerplate "ordering clause" at the end of the Order. 1999 Order, 14 F.C.C.R. at 2648 (¶ 232).

The 1999 Order had a short shelf-life. Early on, some independent PSPs complained to the FCC that the compensation plan established in the 1999 Order was not working. The PSPs primarily claimed that they were not receiving compensation for certain dial-around calls handled by SBRs. Responding to these complaints in 2001, the FCC concluded that the 1999 Order "ha[d] not had the intended effect of ensuring that PSPs receive compensation for each and every completed, coinless payphone call." *Payphone Docket*, Second Order on Recons. ("2001 Order"), 16 F.C.C.R. 8098, 8103 (¶ 10) (2001). To address these problems, the FCC substantively modified its payphone compensation plan to require the first IXC in the call path to compensate the PSP for a completed dial-around call, even if the call was ultimately terminated by a SBR. *Id.* (¶ 11). The IXCs were then assigned responsibility for seeking reimbursement from the SBRs. *Id.* The FCC posited that this new plan should "address the difficulty which PSPs face in obtaining compensation for coinless calls placed from payphones which involve a [SBR] in the call path," and thus "remedy this failure in the

[original] compensation regime" established in the 1999 Order. *Id.* at 8098 (¶ 1), 8103 (¶ 10).

The 2001 Order was vacated by the D.C. Circuit, which held that the FCC had promulgated the new compensation plan without proper notice and comment, in violation of the Administrative Procedure Act ("APA"). *Sprint Corp. v. FCC*, 315 F.3d 369, 372, 377 (D.C. Cir. 2003). On remand, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on whether the compensation plan adopted in the 2001 Order or another compensation plan would better satisfy the objectives of § 276. *Payphone Docket*, Further Notice of Proposed Rulemaking ("2003 NPRM"), 18 F.C.C.R. 11,003, 11,005 (¶ 3) (2003). The 2003 NPRM did not mention § 201(b) let alone indicate that the FCC was considering making any finding that a violation of the compensation plan would constitute an "unjust or unreasonable" practice under the statute.

In August 2003, the Ninth Circuit held that Congress did not intend for violations of the FCC's payphone compensation plan to be privately enforceable in federal court under § 276. *Greene v. Sprint Commc'ns Co.*, 340 F.3d 1047 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004). The Ninth Circuit found that Congress intended for such compensation disputes to be handled by the FCC as part "of a coherent national communications policy." *Id.* at 1053 (citations omitted).

In October 2003, the FCC issued its third payphone compensation plan. *Payphone Docket*, Report & Order ("2003 Order"), 18 F.C.C.R. 19,975 (2003). The 2003 Order "squarely" places responsibility for payphone compensation on the carrier who terminates completed dial-around calls, whether the carrier is an IXC or a SBR. *Id.* at 19,986 (¶ 24). The 2003 Order also imposes new call-tracking and reporting obligations to reduce compensation disputes. In announcing this newest plan, the FCC stated that it was "guided by [its]

practical expertise in overseeing the various compensation regimes [the agency] implemented since the adoption of section 276 in the 1996 Act." *Id.* at 19,987 (¶ 26). Because the 2001 Order "did not optimally ensure fair compensation, we are adopting new rules today to replace it." *Id.* at 19,984 (¶ 20). The FCC also established a prospective effective date for the 2003 Order, "[t]o provide carriers time to transition to our new rules . . . ." *Id.* at 20,004 (¶ 55).

In addition to adopting a new payphone compensation plan, the FCC inserted a single reference to § 201(b) in the 2003 Order that was plainly a *post hoc* reaction to *Greene*. The sentence asserts, without prior notice or any accompanying rationale, that

> failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of § 276 and an unjust and unreasonable practice in violation of § 201(b) of the Act.

*Id.* at 19,990 (¶ 32).

In contrast to the episodic and cursory references to § 201 in the FCC's various payphone orders, the agency has established detailed administrative complaint procedures for PSPs and IXCs to resolve payphone compensation disputes. 1996 Order, 11 F.C.C.R. at 20,569-73 (¶¶ 55-61). The 1996 Order instructs PSPs to file complaints with the FCC; explains when particular claims are ripe for agency adjudication (*e.g.*, only after a required call "verification" process); provides "timeliness" defenses (*i.e.*, for claims submitted more than a year after a payment period); and establishes when the federal limitations period for compensation claims commences. *Id.* at 20,597-98 (¶¶ 112-114). The FCC committed "aggressively [to] take action on such complaints." *Id.* at 20,598 (¶ 114). Numerous PSPs, including Petitioners, have availed themselves of these administrative complaint procedures in seeking alleged underpayments of payphone

compensation from IXCs and SBRs. *See, e.g., APCC Servs., Inc. v. Network IP, LLC*, 20 F.C.C.R. 2073 (2005); *APCC Servs., Inc. v. TS Interactive, Inc.*, 19 F.C.C.R. 10,456 (2004); *Bell Atl.-Del., Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15,918 (2002).

## C. Relevant Case Proceedings

### 1. *The Petitioners' Assignments From PSPs*

Petitioners sued AT&T and Sprint in 1999 and 2001, respectively, for alleged violations of the original payphone compensation rules established in the 1999 Order. With one exception (People's Telephone Company, a plaintiff in the litigation against AT&T), the Petitioners are "aggregators"—a telecommunications industry term for corporations that contract with PSPs to handle billing and collection of dial-around compensation. App. 3a. Petitioners sued as aggregators under assignments in which the PSP "assigns, transfers, and sets over to [the aggregator] *for purposes of collection* all rights, title, and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial Around Compensation.'" App. 4a (emphasis added). Each assignment appoints the aggregator as attorney-in-fact with power to take all action necessary to collect dial-around compensation, including the right to retain counsel, file lawsuits, and enter into settlements. App. 4a. Under the assignments, the Aggregator-Petitioners must pass back to the PSPs any and all amounts they collect. App. 4a, 9a. Nor do they have any other financial interest in the outcome of the litigation: their compensation is not tied to litigation success, but rather to "the number of payphones and telephone lines operated by their PSP clients." App. 23a.

### 2. *The District Court Rulings*

On March 28, 2003, the district court dismissed the Aggregator-Petitioners' claims in the AT&T case for lack of standing, holding that the assignments of the payphone

compensation claims were invalid. App. 94a-108a. On reconsideration, the district court reversed itself and ruled that the assignments vested the Aggregator-Petitioners with a concrete interest in the litigation sufficient to establish Article III standing. App. 61a-78a.

Contemporaneously, a district court in California held, in an action brought by PSPs, that Congress did not intend to create a private right of action under § 276 for payphone compensation disputes. *Greene v. Sprint Commc'ns*, 02-3841, slip op. (C.D. Cal. July 1, 2002). The district court in *Greene* held that § 276 does not confer a private cause of action under § 207, because § 276 can be violated only by the FCC, not by common carriers. The district court also held that the payphone compensation plan promulgated by the FCC could not serve as a basis for a private cause of action under § 207, because § 207 only creates causes of action for violations of the Telcom Act, not FCC regulations. *Id.* at 3-5.

In response to the district court's decision in *Greene*, Petitioners moved to amend their complaint in the Sprint case to add alternative causes of action under §§ 201(b), 407, and 416(c) of the Telcom Act. The district court granted Petitioners leave to amend their complaint. App. 79a-80a. Petitioners did not seek leave to amend their complaint in the AT&T case.

Shortly thereafter, the Ninth Circuit in *Greene* affirmed the district court's determination that Congress did not intend to create a private right of action for payphone compensation disputes. *Greene*, 340 F.3d at 1053. Sprint sought dismissal of Petitioners' claims in this case based on the Ninth Circuit's ruling in *Greene*. App. 31a-45a. AT&T moved for reconsideration of the district court's ruling on the standing issue, and also requested dismissal based on the *Greene* decision. App. 46a-60a. The district court denied the motions in both cases, but certified the private right of action and standing

questions for interlocutory appeal. App. 45a, 59a. The D.C. Circuit accepted both questions and consolidated the two cases for review. App. 146a-147a.

### 3. *The D.C. Circuit's Decision*

By a 2-1 vote, the D.C. Circuit affirmed the district court's determination that the Aggregator-Petitioners had standing to sue as assignees. App. 5a-11a. Judge Sentelle dissented from this part of the decision. Because the assignments gave the Aggregator-Petitioners the right to sue but not the right to recovery, Judge Sentelle opined that the Aggregator-Petitioners lacked a sufficient interest in the outcome to establish Article III standing. App. 20a-25a. Judge Sentelle also found that "associational" standing principles were inapplicable because the Aggregator-Petitioners were not an association. App. 25a.

The D.C. Circuit reversed the district court's ruling on the private right of action question. Concurring with the Ninth Circuit's decision in *Greene*, the D.C. Circuit held that "§ 276 does not create a right of action for a PSP (or its assignee) to recover dial-around compensation from an IXC." App. 13a. The D.C. Circuit observed that "[§ 276] is by its terms addressed neither to the rights of PSPs nor to the obligations of IXCs." App. 13a. Like the statute considered by this Court in *Sandoval* (§ 602 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000-1), the D.C. Circuit noted that § 276 contains no "rights-creating" language that demonstrates a congressional intent to create a private right of action. Indeed, § 276 is "'yet a step further removed: It focuses . . . on the agenc[y] that will do the regulating.' Section 276 is addressed only to 'the Commission,' which it directs to 'take all actions necessary . . . to ensure that all [PSPs] are fairly compensated' for the calls they originate." App. 14a (quoting *Sandoval*).

By a 2-1 vote, a different majority of the D.C. Circuit further held that § 201(b) does not support a private right of

action for alleged violations of the 1999 Order. App. 14a-17a. The D.C. Circuit observed that Petitioners' arguments (which the FCC supported as *amicus*) "would transform § 201(b) into a catchall provision, converting any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court. This result is not plainly evident from the text of the Act, and nothing suggests that Congress intended its words to have such a sweeping effect." App. 15a. The D.C. Circuit also emphasized that the 1999 Order contained just a single general reference to § 201 in the boilerplate "ordering clause" at the end of the order, along with a laundry list of other statutes. App. 15a; *see also* 1999 Order, 14 F.C.C.R. at 2648 (¶ 232). The FCC's only discussion in the 1999 Order about enforcement of the payphone rules contemplated "that [such] collection actions will be *before the Commission* (as indeed they must be in any action by a carrier against a PSP for not making a refund)." App. 16a (emphasis added).

In a *post hoc* attempt to rationalize some private right of action, Petitioners and the FCC contended that the D.C. Circuit should afford *Chevron* deference to the single reference to § 201(b) in the 2003 Order. Petitioners and the FCC failed to explain how this bare, unsubstantiated assertion in the 2003 Order—which established a new payphone compensation plan with only prospective effect—could provide retroactively a private right of action for alleged violations of the twice-superseded payphone compensation plan established in the 1999 Order. The D.C. Circuit did not address the 2003 Order. It held that there was "no authoritative interpretation of § 201(b) in this case" to support a private right of action for alleged violations of the 1999 Order. App. 16a. Chief Judge Ginsburg dissented on the § 201(b) issue. He would have afforded *Chevron* deference to the single reference to § 201(b) in the 2003 Order on the theory that it made "explicit" what was "implicit" in the 1999 Order. App. 26a-30a.

Finally, the D.C. Circuit held that § 416(c) does not supply a private right of action for payphone compensation disputes. App. 17a-20a. Section 416(c) states that "[i]t shall be the duty of every person . . . to observe and comply with [every order of the Commission] so long as the same shall remain in effect." 47 U.S.C. § 416(c). The D.C. Circuit "agree[d] entirely" with the analysis of then-Judge Breyer in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 4-9 (1st Cir. 1984), that § 401(b) of the Communications Act is limited to adjudicatory orders. App. 20a. The D.C. Circuit likewise concluded that the term "order," as used in § 416(c), refers only to adjudicatory and not to rulemaking decisions. App. 19a-20a. The D.C. Circuit observed that any contrary interpretation making § 416(c) generally applicable to FCC regulations would "'interfere seriously with the well established principle that the 'enforcement' of the Communications Act is entrusted primarily to' the FCC . . . rather than to the district courts." App. 19a (quoting *New England Telephone*, 742 F.2d at 5).

Petitioners sought rehearing and rehearing en banc, arguing that the D.C. Circuit erred by failing to afford *Chevron* deference to the FCC's bare reference to § 201(b) in the 2003 Order. Alternatively (and for the first time), Petitioners asked the D.C. Circuit to refer the § 201(b) question to the FCC under the primary jurisdiction doctrine. Both petitions were denied. App. 148a-149a; App. 150a-151a.

### D. The Ninth Circuit's Decision In *Metrophones*

While the rehearing petitions were pending before the D.C. Circuit, the Ninth Circuit decided *Metrophones*.[2] The PSPs in *Metrophones* brought suit alleging violations of the payphone compensation plan established in the 2001 Order.

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[2] Petitioners submitted *Metrophones* to the D.C. Circuit for consideration in conjunction with their request for rehearing and rehearing en banc.

Compl. ¶ 1, *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, No. 03-0694 (W.D. Wash. Mar. 19, 2003). The Ninth Circuit reaffirmed its prior ruling in *Greene* that Congress did not intend to make the FCC's payphone compensation plan privately enforceable in federal court under § 276. *Metrophones*, 423 F.3d at 1063-64. The Ninth Circuit likewise held that § 416(c) does not provide a private right of action for such disputes. *Id.* at 1071. Finally, the Ninth Circuit ruled that the FCC's reference to § 201(b) in the 2003 Order, while admittedly brief, was worthy of *Chevron* deference when "supplemented" by the agency's *amicus* brief in the case. *Id.* at 1066-67. Thus, even though the PSPs in *Metrophones* had sued under the 2001 Order, the Ninth Circuit viewed the 2003 Order as establishing retroactively a federal private right of action under § 201(b) for payphone compensation claims.

## REASONS FOR DENYING THE PETITION

### I. THE "SPLIT" BETWEEN THE D.C. AND NINTH CIRCUITS ON THE § 201(b) QUESTION DOES NOT MERIT THIS COURT'S REVIEW.

The Petition first seeks review of an asserted "conflict" between the D.C. and Ninth Circuits' rulings on the § 201(b) private right of action question. This supposed "conflict" is overstated and, in all events, does not warrant the Court's attention for several reasons.

#### A. The D.C. and Ninth Circuits Examined Different FCC Orders And Compensation Plans In Analyzing The § 201(b) Issue.

Petitioners wrongly portray the D.C. and Ninth Circuit decisions as creating an irreconcilable conflict on whether § 201(b) creates a private right of action for violations of the FCC's payphone compensation plan. In fact, the two courts examined different payphone compensation plans in different

FCC Orders issued several years apart in reaching their respective § 201 determinations.

### 1. *The D.C. Circuit Examined The 1999 Order.*

Petitioners brought suit against AT&T and Sprint for alleged violations of the payphone compensation plan adopted in the FCC's 1999 Order. For this reason, the D.C. Circuit properly focused on the 1999 Order in considering whether the FCC had interpreted § 201(b) to encompass alleged violations of that compensation plan.

The D.C. Circuit found nothing in the 1999 Order that could possibly be deemed an authoritative interpretation of § 201(b) by the FCC, worthy of *Chevron* deference. The 1999 Order contains only a single general reference to § 201 along with a laundry list of other statutes cited at the end of the Order. 1999 Order, 14 F.C.C.R. at 2648 (§ 232). Because the 1999 Order barely mentioned § 201, and utterly failed to interpret it, the D.C. Circuit properly concluded that there was no basis to find that a violation of the compensation plan established in the 1999 Order constituted an "unjust or unreasonable" practice under subpart (b) of the statute. As the D.C. Circuit explained:

> the body of the FCC's 1999 "Order" said not a word about § 201(b). All we see is boilerplate in the ordering clause, and in the clause identifying the authority for Part 64 of the rules, citing a list of sections including "201." (This is in marked contrast to the treatment of § 276, which the Commission mentioned throughout as the source of its authority.) It cannot be that the mere citation of § 201 displays—in *Sandoval's* words—an intent that the regulation setting the compensation level should be privately enforceable in court. Still less can it be that the mere citation of § 201 is entitled to *Chevron* deference . . . .

App. 15a-16a.

*Chevron* deference to the passing reference to § 201 in the 1999 Order is unwarranted for an additional reason. A statutory interpretation reached through rulemaking conducted in conformity with the APA notice-and-comment requirement has the twin attributes of fairness to interested parties and careful deliberation by the agency that justify treating the interpretation as having the force of law, worthy of *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996). Here, the public notice that preceded the 1999 Order sought comment on several enumerated issues, including, for example, whether "other market-based methodologies [besides carrier-pays] could be used to establish a per-call compensation rate for coinless calls." Public Notice, 13 F.C.C.R. at 12,094. It did not, however, mention or seek comment on the issue of whether violations of the payphone compensation plan should be classified as "unjust or unreasonable" practices within the meaning of § 201(b).[3]

Recognizing these problems, Petitioners contend that the D.C. Circuit should have afforded *Chevron* deference to the FCC's passing reference to § 201(b) in the 2003 Order, as a basis for treating (retroactively) violations of the 1999 Order as "unjust or unreasonable practices." Pet. 16-19. This contention fails on several grounds.

The 2003 Order is irrelevant because Petitioners did not sue AT&T or Sprint for violations of the 2003 Order. Moreover, there is a presumption against retroactive rulemaking that precludes Petitioners from basing their claims on the 2003 Order. "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to

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[3] In noting the absence of any *Chevron*-worthy interpretation of § 201(b), the D.C. Circuit also expressed concern about the "potential consequences to judicial dockets" if the FCC were free to declare, without prior notice or explanation, that certain practices violated the statute. App. 16a.

encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Congress did not expressly authorize the FCC to promulgate retroactive rules under § 201(b). Thus, the 2003 Order, which adopted a new compensation plan, cannot be used to supply a private right of action for claims based on violations of the original compensation plan adopted in the 1999 Order, which—by the FCC's own description—imposed different substantive obligations on IXCs and PSPs, was ambiguous in material respects, and proved unworkable. 2003 Order, 18 F.C.C.R. at 19,983 (¶¶ 18-19). Indeed, the FCC itself said that the 2003 Order had only prospective effect. *Id.* at 20,004 (¶ 55).

Petitioners are likewise mistaken in asserting that *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005), requires that *Chevron* deference be afforded to the 2003 Order's passing reference to § 201(b). Apart from the fact that Petitioners sued AT&T or Sprint for alleged violations of the 1999 Order, *Brand X* only underscores the lack of any authoritative interpretation of § 201(b) by the FCC. In contrast to the unexplained and cursory citation to § 201(b) in the 2003 Order, which was not presaged in the 2003 NPRM, the FCC order examined in *Brand X* followed from a notice of proposed rulemaking that announced the subject matter of the rulemaking and direction of the agency. Further, the *Brand X* order contained a detailed analysis of the agency's reasoning based on an extensive administrative record. *Id.* at 2697-99, 2708-11.

Lastly, Petitioners improperly rely on arguments made by the FCC in its *amicus* brief to the D.C. Circuit, asserting that the agency's pronouncements about § 201(b) deserve deference under *Chevron* and *Brand X*. Pet. 18. This Court has long held that such "post-hoc rationalizations for agency [orders]," proffered in litigation, are never a *Chevron* sub-

stitute when the agency failed to justify the order when issued. *Bowen*, 488 U.S. at 212 (internal quotations omitted). Nothing in *Brand X* changed this basic principle of administrative law.

### 2. *The Ninth Circuit Examined The 2003 Order.*

Unlike Petitioners, the PSPs in *Metrophones* brought suit for alleged violations of the new compensation plan established in the 2001 Order—and not for alleged violations of the original compensation plan adopted in the 1999 Order. Thus, in considering the § 201(b) question in *Metrophones*, the Ninth Circuit did not examine the 1999 Order.

The Ninth Circuit posited that the FCC's passing reference to § 201(b) in the 2003 Order, when "supplemented" by the agency's *amicus* brief in the case, was entitled to *Chevron* deference and sufficient to create a private right of action in federal court for the PSPs. *Metrophones*, 423 F.3d at 1066-67. The Ninth Circuit did not explain how the 2003 Order, which the FCC itself said had only prospective effect, could provide the basis for a § 201(b) claim arising solely from alleged violations of the earlier (and substantively different) payphone compensation plan adopted in the 2001 Order.[4]

Ultimately, whether (as Petitioners contend) the Ninth Circuit was right in its analysis of § 201(b) does not affect the

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[4] The FCC's citation to § 201(b) in the 2003 Order is not a *Chevron*-worthy interpretation, even assuming the order were otherwise relevant to the actual claims asserted by the PSPs. The 2003 NPRM did not indicate that the FCC was considering deeming violations of its forthcoming payphone compensation plan an unjust or unreasonable practice for purposes of § 201(b). *See* 2003 NPRM, 18 F.C.C.R. at 11,003-28 (¶¶ 1-71). The statement was inserted without prior notice, one month after the *Greene* decision rejecting a private right of action under § 276, and without any administrative record, analysis, or supporting rationale. It was not the product of the kind of reasoned deliberative process that warrants *Chevron* deference. *Accord Motor Vehicles Mfrs. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983).

proper disposition of the Petition. Because the D.C. and Ninth Circuits were dealing with different payphone compensation plans, established in different FCC Orders, their § 201(b) rulings do not present an irreconcilable conflict that justifies this Court's review.[5]

### B. The § 201(b) Question Can Be Readily Addressed By The FCC In A Proper Rulemaking And Without Intervention By This Court.

As indicated, the 2003 Order was adopted to reduce, if not eliminate, future payphone compensation disputes based on the FCC's "practical expertise in overseeing the various compensation regimes . . . implemented" under § 276. 2003 Order, 18 F.C.C.R. at 19,987 (¶ 26). Should future disputes arise under the 2003 Order, PSPs and others can pursue their claims through the administrative complaint procedures established by the FCC.

The D.C. Circuit was skeptical that a violation of the FCC's payphone compensation plan could be properly characterized as an "unjust or unreasonable practice" within the meaning of § 201(b). App. 15a. That said, if the FCC believes that § 201(b) can be properly interpreted to encompass alleged violations of the payphone compensation plan established in the 2003 Order, the agency should justify its position in a properly noticed rulemaking, based on an adequate administrative record. Any such rulemaking by the

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[5] A district court in Utah recently certified the § 201(b) question for interlocutory appeal to the Tenth Circuit. *Flying J Inc. v. Sprint Commc'ns Co. L.P.*, No. 99-111 (D. Utah). Further consideration of the § 201(b) question by other circuit courts may help to clarify whether the D.C. and Ninth Circuits' analyses of the different FCC Orders present any genuine or lasting confusion or tension over these issues. *See* Justice John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (Nov. 1982) (from the Court's perspective, "experience with conflicting interpretations of federal rules [of law] may help illuminate an issue before it is finally resolved").

FCC would also be judicially reviewable in the ordinary course. *See* 28 U.S.C. § 2341 *et seq.* There is thus no need for this Court's consideration of the issue at this time. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 227 (8th ed. 2002) ("[A] conflict of decisions may safely be relied on as a ground for *certiorari* only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone.") (quoting Justice Harlan).

Petitioners virtually concede this point by asserting that the D.C. Circuit should have referred the § 201(b) question to the FCC under the primary jurisdiction doctrine instead of remanding for dismissal. *See* Pet. 16-17, 20-22. Petitioners wisely do not request a primary jurisdiction referral from this Court. Having failed to seek such a referral from the D.C. Circuit, and having successfully *opposed* referral in the district court, Petitioners have waived any such right.[6] Petitioners instead contend that the principles underlying the primary jurisdiction doctrine demonstrate that the D.C. Circuit *should have* referred the § 201(b) issue to the FCC *sua sponte*, rather than determining on its own that the general reference to § 201 in the ordering clause of the 1999 Order was not worthy of *Chevron* deference. Pet. 20-22. But this argument is fatal to the Petition: By acknowledging that the FCC can and should address the § 201(b) question based on a proper administrative record, Petitioners only confirm that the question does not warrant this Court's immediate attention.

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[6] *See Baltimore & Ohio Chicago Terminal R.R. Co. v. Wisconsin Cent. Ltd.*, 154 F.3d 404, 411 (7th Cir. 1998) ("[T]he doctrine of primary jurisdiction is not, despite its name, jurisdictional. Instead, it presupposes that the court . . . has jurisdiction over the case. It is therefore waivable"); *Gross Common Carrier v. Baxter Healthcare Corp.*, 51 F.3d 703, 706 (7th Cir. 1995) (same); *United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983) (same).

### C. The § 201(b) Question Has Limited Importance.

Because this case only involves alleged violations of the superseded 1999 Order, the § 201(b) question presented by the Petition has limited importance. The Telcom Act contains a two year statute of limitations for complaints against carriers for the recovery of damages. *See* App. 125a (holding that the two year statute of limitations set forth in § 415(b) "applies equally to actions in district court"). The present action and a few other cases pending in different jurisdictions are the last of their kind; the window for payphone compensation claims under the 1999 Order has closed. And because the 2003 Order was adopted to help eliminate the types of compensation disputes and problems created by the 1999 Order, the prospect of additional litigation over the new payphone compensation plan should be reduced. Thus, the § 201(b) issue raised in the Petition lacks sufficient importance for this Court's intervention.

## II. THE D.C. AND NINTH CIRCUITS APPLIED SETTLED PRECEDENTS IN FINDING NO PRIVATE RIGHT OF ACTION UNDER § 276 TO ENFORCE THE FCC'S PAYPHONE COMPENSATION PLAN.

The D.C. and Ninth Circuits are the only circuit courts to consider whether § 276 confers a private right of action for disputes arising under the FCC's payphone compensation plan. Both courts applied properly stated principles from *Sandoval* and *Chevron* in concluding that Congress did not intend for § 276 to create such a remedy. Although Petitioners may disagree with the outcome of the D.C. and Ninth Circuits' analyses, the question does not merit this Court's review. "[C]ertiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Petitioners contend that "[u]nder the proper reading of *Sandoval* and *Chevron* the distinction between the Act and FCC regulations is a distinction that makes no difference." Pet. 25. They cite *Sandoval* for the proposition that "'[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of that statute to be so enforced as well.'" Pet. 26. Petitioners then argue that, through its various payphone compensation orders, the FCC has "authoritatively construe[d]" § 276 to impose payphone compensation duties on IXCs and that this interpretation must be accorded *Chevron* deference. Pet. 26-27. Hence, under Petitioners' theory, an alleged violation of the FCC's payphone compensation plan is equivalent to an alleged violation of § 276 and redressable in federal court through the §§ 206/207 private right of action.

The D.C. and Ninth Circuits properly applied *Sandoval* and *Chevron* in rejecting this notion. Indeed, *Sandoval* refuted the very argument Petitioners make here. Like Petitioners, "the Government and respondents [in *Sandoval*] argue[d] that the [agency] *regulations* contain rights-creating language and so must be privately enforceable . . . ." *Sandoval*, 532 U.S. at 291 (emphasis in original). But as this Court observed, this "argument skips an analytical step. Language in a regulation may invoke a private right of action that Congress *through statutory text* created, but it may not create a right that Congress has not." *Id.* (emphasis added). Thus, *Sandoval* makes clear that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

Applying these principles, the D.C. and Ninth Circuits examined the text and structure of § 276 to ascertain congressional intent and found no rights-creating language that might confer a private remedy for PSPs against IXCs. As the D.C. Circuit observed, "[n]othing in the statute requires the [FCC] to designate the IXC as the party responsible for dial-around payment." App. 14a. The Ninth Circuit reached the same conclusion, noting that § 276 "does not say 'PSPs shall be entitled to fair compensation,' or 'IXCs shall pay PSPs.'" *Greene*, 340 F.3d at 1050. Section 276 is addressed solely to the FCC and directs the agency to adopt a payphone compensation plan. The statute does not suggest (let alone require) that IXCs must compensate PSPs. Both courts properly held, therefore, that the statute cannot be violated by IXCs. And because the §§ 206/207 private right of action only applies to common carrier violations of the Act, § 276 displays no intent by Congress to create a private remedy. *See* App. 14a; *Greene*, 340 F.3d at 1050-51. That the FCC ultimately chose, for administrative convenience, to assign payment obligations to IXCs under its payphone compensation plan cannot, in *Sandoval*'s words, "create a right that Congress has not." 532 U.S. at 291.

The D.C. and Ninth Circuits also properly declined to afford *Chevron* deference to the FCC's interpretation of § 276 in the 1999 Order. *Chevron* deference only applies when a statute is ambiguous and the agency's interpretation of it is reasonable. *Chevron*, 467 U.S. at 843-44. The D.C. Circuit acknowledged that the FCC "mentioned [§ 276] throughout [the 1999 Order] as the source of its authority" to implement a payphone compensation plan. App. 15a. But, as the D.C. Circuit recognized, whether a statute is a source of authority for regulatory action and whether the statute creates a private right of action for violations of agency regulations are two different matters. In light of *Sandoval*, the D.C. Circuit correctly looked to the text and structure of the Act "to determine whether [the statute] displays an intent to create

*not just* a private right *but also* a private remedy." App. 11a, 13a-14a (applying *Sandoval*, 532 U.S. at 286-87) (emphasis added). Having determined that § 276 is unambiguously directed to the FCC, and does not address the rights or obligations of any private parties, the D.C. Circuit properly declined to afford *Chevron* deference to the FCC's view that IXCs could violate the statute: "Because the IXCs are not regulated by § 276, there is no way in which they could have violated that provision." App. 14a.

The Ninth Circuit in *Metrophones* similarly acknowledged that the FCC had asserted, in its 2003 Order, that a failure to pay compensation under its new plan would violate § 276. *Metrophones*, 423 F.3d at 1064 n.4. The Ninth Circuit refused to afford *Chevron* deference to this bare assertion and affirmed its prior holding in *Greene* that Congress did not intend to create a private remedy under the statute. *Id.*

In sum, both the D.C. and Ninth Circuits applied properly stated rules of law in concluding that § 276 does not confer a private right of action to enforce the FCC's payphone compensation plan. The rulings were correct and do not warrant review by this Court.

## III. WHETHER § 416(c) CONFERS A PRIVATE RIGHT OF ACTION FOR PAYPHONE COMPENSATION DISPUTES DOES NOT MERIT THIS COURT'S REVIEW.

Section 416(c) of the Telcom Act requires all persons "to observe and comply with [FCC] orders." App. 179a. The D.C. and Ninth Circuits both held that § 416(c) does not confer a private right of action for alleged violations of the FCC's payphone compensation plans. App. 17a-20a; *Metrophones*, 423 F.3d at 1071. These rulings were correct and do not merit this Court's consideration.

In rejecting the arguments of Petitioners (and the FCC as *amicus*) on this point, the D.C. Circuit adopted the reason-

ing of then-Judge Breyer, in *New England Telephone*, that § 416(c) applies "only to adjudicatory and not to rulemaking decisions." App. 18a-19a (citing 742 F.2d at 4-9). The D.C. Circuit determined that a contrary interpretation of § 416(c)

> would render § 201(b) superfluous: any failure to comply with a regulation, not only unjust and unreasonable practices, would be a violation of the Act and therefore actionable under §§ 206 and 207. Such a construction simply cannot be. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) ("It is . . . a cardinal principle of statutory construction that a statute ought, upon the whole, be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.").

App. 19a.

In *Metrophones*, the Ninth Circuit held that a carrier's obligation to compensate PSPs under the payphone compensation plan is not enforceable as a violation of § 416(c), regardless whether the provision applies to regulatory as well as adjudicatory "orders." Like the D.C. Circuit, the Ninth Circuit reasoned that "to hold that §§ 206 and 207 encompass all violations of § 416(c) would render superfluous the requirement that an action under § 206 allege a violation of a *statute*." *Metrophones*, 423 F.3d at 1071 (emphasis in original).

Petitioners assert that the decisions of the D.C. and Ninth Circuits on the § 416 question "deepen" a circuit split over whether regulatory and adjudicatory orders are "orders" within the meaning of §§ 401(b) and 416(c), Pet. 22-24, and will "generate confusion and inconsistency" among lower courts facing the same question, Pet. 24. Petitioners' assertion is demonstrably overstated. This Court has tolerated the

circuit "split" on the § 416 issue for nearly twenty years.[7] And for good reason: As Petitioners are forced to acknowledge, the issue has virtually no real-world consequences. "[E]ven though it has been clearly established in six circuits that rulemaking orders are 'orders' under the Act, *very few cases* alleging violations of FCC rules have been filed in those circuits." Pet. 24 n.13 (emphasis added).

Because actions involving this narrow question are rare—even in the circuits that consider rulemakings to be "orders"—the D.C. and Ninth Circuits' rulings will cause little, if any, tension in the lower courts. Accordingly, the issue is unworthy of this Court's attention.

## IV. SERIOUS STANDING ISSUES MAKE THIS CASE AN INAPPROPRIATE VEHICLE FOR REVIEW.

Even if the questions presented by the Petition merited the Court's attention, this case presents an unsuitable vehicle for reviewing them because of the significant standing issues that arise from the assignments under which Petitioners have sued. As a threshold matter, the Court would have to resolve the standing issues before it could turn to the questions presented by the Petition. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-91 (1998).

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[7] In 1984, the First Circuit concluded that § 401(b) is limited to adjudicatory orders. *New England Tel.*, 742 F.2d at 4-9. This Court denied *certiorari*. 476 U.S. 1174 (1986). In 1987, the Ninth Circuit reached a contrary conclusion. *Hawaiian Tel. Co. v. Public Utils. Comm'n*, 827 F.2d 1264, 1270-72 (9th Cir. 1987). Despite this split, the Court denied *certiorari*. 487 U.S. 1218 (1988). The Fourth, Fifth, Sixth, Seventh and Eighth Circuits decided the issue before 1990, siding with the Ninth Circuit. *See Alltel Tenn., Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 308 (6th Cir. 1990) (citing circuit cases). The Fourth, Fifth, and Eighth Circuit decisions were vacated by this Court, on other grounds, in light of *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). *See Alltel*, 913 F.2d at 308 (noting vacaturs).

The contractual arrangements between the Aggregator-Petitioners and the PSPs feature assignments in which a PSP "assigns, transfers, and sets over to [the aggregator] *for purposes of collection* all rights, title, and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial Around Compensation.'" App. 4a (emphasis added). Under the assignments, the aggregators must pass back to the PSPs any and all amounts they collect in litigation brought on behalf of the PSPs or in settlement of the PSPs' claims. App. 4a, 9a, 23a-24a. Nor do they have any other financial interest in the outcome of the litigation: their compensation is not tied to litigation success, but rather, to "the number of payphones and telephone lines operated by their PSP clients." App. 23a.

By a 2-1 vote, the D.C. Circuit held that the Aggregator-Petitioners had a sufficient "personal stake" in the litigation to give them Article III standing, even though the assignments obligate them to pass back all amounts recovered to the PSPs. App. 10a. In reaching that conclusion, the majority sought "guidance" from Federal Rule of Civil Procedure 17(a), which governs real parties in interest. App. 9a. According to the majority, "[w]hat the aggregators have promised to do with any recovery is irrelevant to their standing—as it would be to their status as real parties in interest." App. 10a.

The majority erred in conflating the Rule 17(a) real party in interest inquiry with the Article III standing inquiry. Although both Rule 17 and Article III require litigants to demonstrate legal injury, "several other elements of the standing doctrine are clearly unrelated to . . . Rule 17(a), and plaintiff must be both the real party in interest and have standing." 6A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 1542, at 330 (1990). As Judge Sentelle observed in his dissent from the standing ruling, the majority glossed

over the glaring Article III standing problems created by the assignments requiring complete pass-through of any recovery from the aggregators to the PSPs. App. 23a-24a. At bottom, those assignments deprive nearly every one of the Petitioners of any concrete, personal stake in these lawsuits that is necessary for a litigant to have Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).[8] Judge Sentelle also pointed out (App. 25a) that the Aggregator-Petitioners do not satisfy this Court's Article III "associational standing" requirements that would enable them to sue under the assignments on behalf of the PSPs whom they purport to represent. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

In the end, the standing issues flowing from the assignments are thorny. They furnish an important, additional ground for denying the Petition.

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[8] As Judge Sentelle remarked in his dissent on the standing question (App. 23a), that the aggregators keep nothing they recover distinguishes this case from the assignment in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), under which a qui tam relator was paid a "bounty" for any recoveries on behalf of the government. *Id.* at 772-73.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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# In the Supreme Court of the United States

APCC SERVICES, INC., ET AL.,

*Petitioners*,

v.

SPRINT COMMUNICATIONS COMPANY L.P., ET AL.,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

This Court has granted certiorari in *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, No. 05-705, to decide whether payphone service providers (PSPs) may invoke the right of action created by 47 U.S.C. §§ 206-207 to assert claims that common carriers have engaged in an "unjust and unreasonable" practice, in violation of 47 U.S.C. § 201(b), when those carriers fail to pay compensation to PSPs in accordance with FCC regulations. This case squarely presents the same question. In *Metrophones*, the Ninth Circuit held that PSPs have a right of action grounded on a violation of Section 201(b); in this case, the D.C. Circuit majority reached the opposite conclusion.

This case (unlike *Metrophones*) presents two other closely related issues that also merit review: (1) an acknowledged conflict between (on one side) the First and D.C. Circuits, both of which have held that the term "order" in the Communications Act refers only to adjudicatory orders, and (on the other) the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, which have held that the term also encompasses certain rulemaking orders; and (2) whether *Alexander* v. *Sandoval*, 532 U.S. 275 (2000), precludes plaintiffs from invoking the express right of action in Sections 206-207 to allege violations of 47 U.S.C. § 276 merely because Congress, in Section 276, chose to delegate to the FCC the details of complying with the congressional ultimatum that PSPs be "fairly compensated for each and every completed intrastate and interstate call."

Respondents argue that none of these issues warrants review by this Court. They are wrong.

### I. There Is An Irreconcilable Conflict Between The D.C. Circuit's Decision In This Case And The Ninth Circuit's Decision In *Metrophones*

Respondents do not dispute that (1) Congress *expressly* required that PSPs be compensated for "each and every com-

pleted intrastate and interstate call" and delegated authority to the FCC to take "all actions necessary" to "ensure" that PSPs receive compensation, 47 U.S.C. § 276(b)(1)(A); (2) Congress *expressly* "declared to be unlawful" common carrier practices that are "unjust or unreasonable," 47 U.S.C. § 201(b); (3) Congress *expressly* created a right of action to sue in federal court *or* to complain to the FCC to recover damages suffered in consequence of any practice by a common carrier that is "declared to be unlawful," 47 U.S.C. §§ 206-208; (4) the FCC *expressly* determined that "[a] failure to pay compensation in accordance with the Commission's payphone rules * * * constitutes * * * an unjust or unreasonable practice in violation of section 201(b) of the Act," 2003 Order ¶ 32. Those undisputed propositions provide ample support for petitioners' (and the Ninth Circuit's and the FCC's) position that a carrier's refusal to pay the required compensation violates Section 201(b), and that PSPs may recover unpaid compensation through suits in federal court pursuant to the right of action created by Sections 206-207.

Respondents have now invented a new rationale for the D.C. Circuit's decision, suggesting that the conflict between the D.C. and Ninth Circuits can be reconciled because the D.C. Circuit examined claims arising under the FCC's 1999 payphone compensation order, while the Ninth Circuit examined claims arising under the 2001 Order. Br. in Opp. 15-16. That argument fails for two reasons.

First, there is *nothing* in the Ninth Circuit's *Metrophones* decision that suggests the decision turned on whether the claims arose under the 2001 Order or the 1999 Order, and there is *nothing* in the D.C. Circuit's decision suggesting that this distinction mattered. Indeed, there is nothing in respondents' own arguments to suggest that this factual distinction should matter. Respondents argue that the FCC's determination in 2003 that a violation of its payphone orders is an unjust and unreasonable practice cannot properly be applied to violations

of the 1999 Order *or* the 2001 Order, because such application would constitute a "retroactive" rule. Br. in Opp. 17-18. If that argument had any validity (as we show below, it does not) it would not reconcile the circuit conflict; it would merely indicate that the Ninth Circuit (rather than the D.C. Circuit) erred.

Second, respondents' retroactivity theory is, in any event, squarely inconsistent with decisions of this Court and many courts of appeals. Thus, even if that theory could explain the D.C. Circuit's decision, it would merely demonstrate that the decision conflicts in other respects with settled law.

*Reiter* v. *Cooper*, 507 U.S. 258 (1993), explains why. There, the Court reinstated a claim under the Interstate Commerce Act[1] for recovery of "unreasonable" charges, even though the claim was asserted before the agency had made any determination about the reasonableness of the charges, and even though such an agency determination was a prerequisite for plaintiff's recovery. The Court did not "discern within the ICA an intent that * * * ICC determination of the reasonable-rate issue must be obtained before filing the civil action." 507 U.S. at 269-270. If an agency properly can make a determination of unreasonableness after a suit is filed, as *Reiter* holds, then *a fortiori* it may make such a determination after the conduct that gave rise to the suit.

That principle is a necessary predicate for many decisions in cases alleging violations of Section 201(b) of the Communications Act, in which plaintiffs asserted claims that a practice or rate was unreasonable, even though the FCC had not yet made such a determination when the suit was filed. See, *e.g.*, *AT&T*

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[1] "The Communications Act, of course, was based upon the I[nterstate] C[ommerce] A[ct] and must be read in conjunction with it." *MCI Telecommunications Corp.* v. *FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990), *cited with approval in MCI Telecommunications Corp.* v. *AT&T*, 512 U.S. 218, 229-230 (1994).

*Corp.* v. *FCC*, 317 F.3d 227 (D.C. Cir. 2003); *MCI Telecommunications Corp.* v. *FCC*, 59 F.3d 1407 (D.C. Cir. 1995); *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir. 1987); *Pacific Tel. & Tel. Co.* v. *MCI Telecommunications Corp.*, 649 F.2d 1315 (9th Cir. 1981).

The only authority that respondents cite in support of their retroactivity theory is *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204 (1988), but that case involved a retroactive adjustment to the compensation owed for services rendered before the adjustment. There is no such retroactivity in this case or in *Metrophones*. Petitioners seek only compensation that is owed under the 1999 Order for calls that were made *after* the 1999 Order established respondents' legal obligation to pay compensation. They do not seek retroactive application of the compensation obligations imposed by the 1999 Order or by any other order. Moreover, the statute that was violated here, Section 201(b), was enacted in 1934, long before respondents engaged in the unjust or unreasonable practice that gave rise to this case.

As we explained in our petition (at 16), the D.C. Circuit should have asked (as the Ninth Circuit asked) whether the violation of the payphone compensation orders is an unjust or unreasonable practice, and, under *Chevron*, it should have deferred to the FCC's answer (in its 2003 Order and in its amicus brief) to that question.[2] Instead, the D.C. Circuit asked whether

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[2] On the merits, respondents make the insubstantial – and misleading – argument that deference is unwarranted because the FCC provided no notice and opportunity for comment before it reached its determination that a failure to comply with the payphone compensation orders is an unjust or unreasonable practice violating Section 201(b). Br. in Opp. 17. Respondents' argument is misleading because they focus on the notice preceding the 1999 Order to the exclusion of the notice preceding the 2003 Order. And respondents' argument is insubstantial because, as we showed in the petition (at 8-9), the 2003 rulemaking expressly placed in issue the question of what remedies exist for violations of the payphone compensation orders. AT&T itself

the FCC *has declared* the practice to be unjust and unreasonable, provided an answer to that question that is indisputably wrong, and dismissed the case on that basis.

## II. The Court Should Correct Erroneous Interpretations Of *Alexander* v. *Sandoval* By The Ninth And D.C. Circuits

Respondents rely on *Alexander* v. *Sandoval*, 532 U.S. 275 (2000), to assert that – notwithstanding the FCC's *Chevron*-deference-worthy conclusion to the contrary – petitioners cannot invoke the express right of action created in Sections 206-207 by alleging a violation of Section 276. They argue that even if two courts of appeals (the D.C. Circuit in this case and the Ninth Circuit in *Greene* v. *Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003)) have misconstrued *Sandoval*, this Court should not clarify the meaning of that decision. Br. in Opp. 22.

In *Sandoval*, the plaintiffs asserted that the implied right of action to sue for violations of Section 601 of Title VI, which prohibits only intentional discrimination, should be expanded to encompass violations of regulations (promulgated under Section 602) prohibiting conduct that was *not* addressed by Section 601, *i.e.*, practices that have a disparate impact. *Sandoval* held there is no implied right of action to sue for violations of such disparate-impact regulations. "[T]he disparate-impact regulations do not simply apply § 601 – since they indeed forbid conduct that § 601 permits – and therefore [it is] clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations." 532 U.S. at 286. Because the regulations are not an "authoritative interpretation"

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emphasized in response the existence of remedies under Sections 206-208, the very remedies AT&T (and Sprint) now claim do not exist. Furthermore, as far back as 1999 *both* AT&T and Sprint touted the existence of such remedies in a D.C. Circuit brief. See Pet. 7. Other than their incorrect "retroactivity" argument, respondents are noticeably silent about the inconsistency between their their current position and positions they took in 1999 and 2003.

of Section 601, a failure to comply with those regulations "that is not also a failure to comply with Section 601 is not actionable" under the right of action for violations of Section 601. *Id.* at 284. A private right of action would have been available if but only if Section 602 (like Section 601) conferred such a right of action. *Id.* at 286.

Here, Sections 206-207 provide the necessary *express* cause of action, and there is no dispute that the FCC's payphone compensation orders "apply" Section 276 and constitute an "authoritative interpretation" of that statutory provision. The FCC did precisely what Congress required: it devised a plan to "ensure" compensation for "each and every" completed payphone call. The statute contains "rights-creating language" (*Sandoval*, 532 U.S. at 288) in the only sense that matters: Congress conferred on PSPs a right to compensation because any failure by the FCC to "ensure" compensation would violate Congress's express command. The court of appeals failed to recognize PSPs' rights only because *Congress* did not require compensation to be paid by respondents, but instead delegated to the FCC the responsibility of deciding which parties should pay compensation. Pet. App. 14a ("Nothing in the statute requires the Commission to designate the IXC as the party responsible for dial-around payment.").

Two circuits have now misinterpreted *Sandoval*. That decision, properly read, requires courts to ask whether Congress intended to create private rights. Here, *Sandoval* has been misconstrued as a limitation on Congress's authority to delegate to a regulatory agency the responsibility for devising detailed rules to ensure protection of the rights that Congress unequivocally meant to create. That misinterpretation of *Sandoval* seriously undermines *Chevron* principles and ignores the cautionary language in *Sandoval* that specifically sought to avoid such a result. *Sandoval* emphasized that, when an agency exercises authority delegated by Congress to construe and implement a

statutory directive, "it is meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.* at 285.

The transformation of *Sandoval* into a broad limitation on Congress's ability to delegate authority to devise detailed rules necessary to implement congressional policy threatens serious mischief. There is no reason to defer correction of this misinterpretation until other circuits commit the same error, or until a circuit split is created because another court of appeals correctly interprets *Sandoval*.

## III. The Court Should Resolve The Circuit Split Concerning The Meaning Of "Order" In The Communications Act

Respondents concede, as the D.C. Circuit acknowledged in this case (Pet. App. 18a-19a), that the courts of appeals have adopted inconsistent interpretations of the term "order" as it is used in critical provisions of the Communications Act. Br. in Opp. 27. The First and D.C. Circuits have construed the term to encompass only adjudicatory orders; the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have held that the term may also encompass rulemaking orders. Respondents do not even try to reconcile these conflicting decisions. They only argue that the circuit conflict is "unworthy of this Court's attention" (*ibid.*) – even though the question involves statutory provisions that are central to the enforcement of FCC orders – because cases presenting this issue are "rare" (*ibid.*) – even though respondents themselves refer to eight cases (not including *Metrophones*) involving this precise issue that have been decided by courts of appeals (*id.* at 27 n.7). Those cases demonstrate that this issue arises on a recurring basis in cases presenting